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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

NO. 746

OCTOBER TERM, 1959

CHARLES S. HELMIG, Petitioner,

v.

CHARLES ALVIN JONES, JOHN C. BELL, JR., MICHAEL A. MUSMANNO, JOHN C. ARNOLD, BENJAMIN R. JONES, HERBERT B. COHEN, THOMAS M. MARSHALL, SARA M. SOFFEL, and HENRY ELLENBOGEN, individually and jointly as members of the Judiciary of the Commonwealth of Pennsylvania, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Charles S. Helmig, petitioner, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Third Circuit to review its judgment dated and entered November 19, 1959 (App. 1).

OPINIONS BELOW

No opinion was delivered in the District Court; and that Court's Order (13a) is not reported.

The Opinion of the Court of Appeals is appended hereto (App. 1), and is reported in 271 F. 2d 414.

JURISDICTION

The judgment sought to be reviewed (App. 1) is dated and entered November 19, 1959. The petition for rehearing was denied, without opinion, on December 4, 1959. Therefore, this petition for writ of certiorari may be filed on or before March 3, 1960.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., sec. 1254(1).

QUESTIONS PRESENTED

When a Complaint in Federal Court asserts damages against members of the State judiciary acting in official capacity; with jurisdiction based on the Constitution of the United States, the Civil Rights Acts, and a sum in excess of the jurisdictional amount exclusive of interest and costs; and alleges deprivations by the defendants discriminatorily, arbitrarily and illegally, of plaintiff's federal property, constitutional and civil rights; do not Orders of Court conflict with the Law of the Land and illegally deprive the plaintiff-appellant of his right to due process of law as guaranteed by the Constitution of the United States, when such orders hold that:

(A) the Complaint fails to state a claim upon which relief can be granted;

(B) the defendants are immune from suit;

(C) the plaintiff does not have the right to discovery under Rule 26(a); and

(D) the defendants did not waive the affirmative defense of immunity pursuant to Rule 12(h), by their failure to plead it under Rule 8(c)?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution of the United States involved herein are the Fifth and Fourteenth Amendments, the pertinent portions of which (U.S.C.A., Constitution, Amendments 1 to 13, p. 172 and Amendment 14, p. 2), are as follows:

"Amendment V. Due Process of Law . . . nor (shall any person) be deprived of life, liberty, or property, without due process of law, . . .".

"Amendment XIV. Section 1. . . . No state shall make or enforce any law which shall abridge the prileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

The statutes involved herein are known as the Civil Rights Acts. The particular statute involved is derived from the Act of April 20, 1871, C. 22, sec. 1, 17 Stat. 13, sec. 1983 of Title 42 of the United States Code, now R.S. Section 1979, the pertinent portion of which is as follows:

"Civil Action for Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Charles Stewart Helmig, the petitioner, is a citizen by birth and a steel broker of Pittsburgh, Pennsylvania, who was the plaintiff in two law suits in Pennsylvania Courts.

In the assumpsit action against Rockwell Manufacturing Company for breach of contract (4a) he obtained a jury verdict in the sum of $177,811.20 which, with interest, now approximates one quarter of a million dollars; and the respondents unlawfully deprived petitioner thereof through a fraudulent judgment *non obstante veredicto,* thus depriving him of his federal property, constitutional and civil rights (5a-6a) including his right to earn a livelihood in his chosen occupation, his right to be compensated for work done and services rendered in his chosen occupation and business, his right to an expectancy of continued employment, and his right to litigate with due process of law to obtain protection and enforcement of those rights.

In the trespass action against Rockwell Manufacturing Company and Bethlehem Steel Company (4a-5a) petitioner alleged and specified a continuing conspiracy, seeking compensatory and exemplary damages resulting therefrom as well as for "wrongfully destroying plaintiff's good cause of action and otherwise injuring the plaintiff in his good name, fame and business, all pursuant to the combination and conspiracy of the defendants . . ."; and the respondents unlawfully deprived petitioner of his federal property, constitutional and civil rights therein, including his right to work and earn a living in his business, his right to an expectancy of continued employment, his right to a hearing

before the taking of his property so that he can defend and enforce those rights, his right to an orderly proceeding adapted to the nature of the case and in accordance with law, and his right to litigate with due process of law.

Consequently, your petitioner brought the instant complaint (3a-7a) seeking damages against the respondents as members of the State judiciary acting in their official capacity, alleging discriminatory, arbitrary and illegal deprivations of his federal property, constitutional and civil rights (5a-6a). Paragraph 3 of the Complaint (4a) alleges: "Jurisdiction is based upon the Constitution of the United States, particularly the Fourteenth Amendment thereto; the Civil Rights Acts, particularly the Act of April 20, 1871, C. 22, Sec. 1, 17 Stat. 13, Sec. 1983 of Title 42 U.S.C., now R.S. Sec. 1979; and an amount in excess of $3,000.00, exclusive of interest and costs".

After service of the Complaint and Notice of Taking Depositions (8a-9a), respondents lodged a Motion to Vacate Notice of Taking Depositions and to Enter Order that Defendants' Depositions Not Be Taken (9a-10a), to which petitioner lodged an Answer (10a-12a). Also, petitioner lodged a Motion for Change of Venue (12a), which was heard together with the other motions before District Judge Herbert P. Sorg.

So that the legal issues raised by the Complaint be not confused, it was pointed out that the Complaint in Federal Court did not constitute an appeal from adverse rulings by respondents in the State Court proceedings, but that it was a separate and independent proceeding against the respondents themselves by reason of their

actions which had the effect of depriving and did deprive petitioner of fed[redacted]nstitutional and civil rights.

In disposing of [redacted]e motions before him, District Judge Sorg abdicated the functions of the District Court because he did not adjudicate anything. He simply handed down an Order (13a), unaccompanied by a legal Opinion.

On appeal, the Court of Appeals (Goodrich and Kalodner, Circuit Judges, and Wood, District Judge) did nothing more. They simply rendered a Per Curiam decision consisting of two sentences (App. 1), decreeing their affirmance. The Court of Appeals failed to discuss therein any facts, issues, authorities or law; so that upon reading what was reported, nobody could ascertain a thing about the case except that it was dismissed.

Hence this petition.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The Judgment Sought To Be Reviewed Conflicts With the Law of the Instant and Other Circuits and With Applicable Decisions of This Court on the Issue of Sufficiency of the Complaint.

It is elementary that on a Motion to Dismiss, all allegations of the Complaint must be taken as admitted to be true and all inferences therefrom must be construed most favorably towards the plaintiff's case.

It is patent on the record that the Complaint fully complies with Federal Rule 8(a) *Claims for Relief,* which provides that "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled". Rule 8(a) (1) is complied with in paragraph 3 of the Complaint (4a); Rule 8(a) (2) is complied with in paragraphs 8, 9, 10 and 11 of the Complaint (5a-6a); and Rule 8(a) (3) is complied with in the conclusion of the Complaint (7a).

In the face of the above record, pursuant to Notice Pleadings, how can anyone learned in the law sincerely deny that the Complaint is sufficient? Furthermore, District Court Judges are bound by the Federal Rules of Civil Procedure as by an Act of Congress. *Foltz v. Moore-McCormack Lines, Inc.,* 19 F. R. D. 301, 1956 (Cf. 28 U. S. C., sec. 2072).

Reasons Relied on For Allowance of Writ.

In the case of *Publicity Building Realty Corp. v. Hannegan,* 139 F. 2d 583, the court stated (p. 586): "This court has repeatedly said that a Motion to Dismiss a Complaint should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which would be proved in support of his claim"; and (p. 587): "An attempt by this Court to rule upon these issues of law, which have not been tried below, and which require the assumption of a factual situation as favorable to the appellants as can reasonably be conceived in view of their pleadings, would not be justified". Also, see *Picking v. Pa. R. Co.,* 151 F. 2d 240, 3rd Cir., 1945.

District Judge Sorg's refusal to permit plaintiff his right to take depositions was a deprivation of the right to discovery as guaranteed by Rule 26 (a). Procedurally, Judge Sorg's consideration of defendants' motion to dismiss prior to discovery was premature, as he thus would necessarily be incapable of giving plaintiff's complaint full consideration.

Has Not District Judge Sorg Erroneously Concluded That The Petitioner Has No Federal Constitutional And Civil Rights?

Regardless of what the respondents advocate and Judge Sorg thinks, the petitioner does have the federal constitutional and civil rights as alleged (6a), under the Law of the Land. *Wilson, Inc. v. F.C.C.,* 170 F. 2d 793 (1948); *Sorenson v. Jacobson,* 232 P 2d 332 (1951); *Carroll v. Local No. 269 I.B.E.W.,* 31 A 2d 223 (1943); *Lasdon v. Hallihan,* 36 NE 2d 227 (1941); *People v. Love,* 298 Ill. 304; *Ackerman v. U. S., C. A., Tex.* (1949), 178 F 2d 983, opinion followed in 179 F. 2d 236, judgment

affirmed 71 S. Ct. 209, 340 U. S. 193, 95 L. Ed. 207; *Hanson v. Union Pac. R. Co.*, 71 N.W. 2d 526 (1955); *Bomar v. Keyes*, 162 F. 2d 136 (1947), certiorari denied 332 U.S. 825, rehearing denied 332 U.S. 845.

Why Was Officialdom So Concerned About the Treasuries of Rockwell And Bethlehem?

In order to protect Rockwell and Bethlehem from their liabilities imposed by law, the respondents herein knowingly sanctioned a fraud of record. Why would these Pennsylvania Judges depart that far from the accepted and usual course of judicial proceedings, knowing that they themselves would become involved? As a result, they have subjected themselves to liabilities imposed by law simply to insure Rockwell and Bethlehem against having to honor their just obligations.

Why Did The Court Of Appeals Refrain From Discussing Any Issues Or Legal Authorities?

It is respectfully submitted that the Court of Appeals failed to, but should have complied with the applicable Canons of Judicial Ethics, there being a serious doubt about violations of Canon 1, Relations of the Judiciary; Canon 2, The Public Interest; Canon 3, Constitutional Obligations; Canon 5, Essential Conduct; Canon 6, Industry; Canon 14, Independence; Canon 19, Judicial Opinions; Canon 20, Influence of Decisions Upon the Development of the Law; Canon 22, Review; and Canon 34, A Summary of Judicial Obligation.

The judgment sought to be reviewed conflicts on the issue of sufficiency of the Complaint, with decisions in the instant and other circuits and with decisions of this Court.

II. The Judgment Sought to Be Reviewed Conflicts With the Law of the Instant and Other Circuits and With Applicable Decisions of This Court on the Issue of Lack of Immunity.

The defense of immunity is not in this case, but your petitioner is obliged to argue the point since there may be an argument on this point in opposition.

In the first place, by their failure to plead the affirmative defense of immunity under Rule 8(c), the defendants have waived it pursuant to Rule 12(h). The decision in *Van Sant v. American Express Co.,* 169 F. 2d 355 3rd Cir. (1948), held that affirmative defenses not pleaded under Rule 8(c) are waived pursuant to Rule 12(h) and then are not subsequently allowable by amendment. This correct interpretation of the Rules was successfully advocated in that case by Hon. Thomas D. McBride, predecessor counsel for the respondents.

In the second place, under the law of this Circuit as well as the Law of the Land, the defendants do not have immunity herein. *Picking v. Pennsylvania R. Co.,* 151 F. 2d 240 (1945), 3CCA, cited with approval in *McShane v. Moldovan,* 172 F. 2d 1016 (1949), *in Cooper v. Hutchinson,* 184 F. 2d 119 (1950), and in *Tenney v. Brandhove,* 341 U. S. 367 (1951). This law has, of course, been upheld in the most recent pronouncement of the Supreme Court of the United States in *Cooper, et al., v. Aaron, et al.,* 358 U. S. 1 (1958). *Cooper v. Hutchinson, supra,* also cited with approval *Valle v. Stengel,* 176 F. 2d 697 (1949). *McShane v. Moldovan, supra,* relies upon *Screws v. United States,* 325 U. S. 108, reaffirming *United States v. Classic,* 313 U. S. 299, all of which resolve any doubt about the lack of immunity.

The judgment sought to be reviewed conflicts on this point of lack of immunity with decisions in the instant and other circuits and with decisions of this Court.

CONCLUSION

It is apparent that there has not been a single adjudication below on the procedural and substantive issues properly raised herein. Just as your petitioner was deprived of his right to due process of law by the respondents as guaranteed by the Fourteenth Amendment, he has been deprived of due process of law in the lower Courts in violation of the Fifth Amendment. Thus your petitioner is justified in advocating that the honor of the fair administration of justice in the Federal System requires that this petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

APPENDIX

CHARLES S. HELMIG, Appellant

v.

CHARLES ALVIN JONES, JOHN C. BELL, JR., MICHAEL A. MUSMANNO, JOHN C. ARNOLD, BENJAMIN R. JONES, HERBERT B. COHEN, THOMAS M. MARSHALL, SARA M. SOFFEL and HENRY ELLENBOGEN, Individually and Jointly as Members of the Judiciary of the Commonwealth of Pennsylvania, Appellees.

No. 12868.

United States Court of Appeals

Third Circuit

Argued Oct. 19, 1959.

Decided Nov. 19, 1959.

Appeal from the United States District Court for the Western District of Pennsylvania; Herbert P. Sorg, Judge.

Paul Ginsburg, Pittsburgh, Pa., for appellant.

Harry J. Rubin, Deputy Atty. Gen. (Anne X. Alpern, Atty. Gen., on the brief), for appellees.

PER CURIAM

This is an appeal from a judgment from the Western District of Pennsylvania dismissing an action by the plaintiff and denying a change of venue. We do not find that the learned district judge committed error either in his decision dismissing the complaint or denying the motion.

The judgment is, therefore, affirmed.

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PETITION FOR REHEARING

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PAUL GINSBURG
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550 Grant Street
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PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition for rehearing of Charles S. Helmig respectfully represents:

First: On April 18, 1960, this Honorable Court entered an Order denying his unopposed petition for writ of certiorari in the above captioned action.

Second: In the District Court the entire Record consisted only of the Complaint, Notice of Taking Depositions, Motion to Dismiss the Complaint, Motion to Vacate Notice of Taking Depositions and to Enter Order that Defendants' Depositions Not Be Taken, Plaintiff's Answer to Motion to Vacate Notice of Taking Depositions and to Enter Order that Defendants' Depositions Not Be Taken, Plaintiff's Motion for Change of Venue, and District Judge Sorg's Order (unaccompanied by an Opinion) granting defendants' motions to dismiss plain-

tiff's complaint and to vacate plaintiff's notice of taking depositions, and denying plaintiff's motion for change of venue.

Third: The Complaint alleges (4a) "Jurisdiction is based upon the Constitution of the United States, particularly the Fourteenth Amendment thereto; the Civil Rights Acts, particularly the Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13, Sec. 1893 of Title 42 U.S.C., now R. S. sec. 1979; and an amount in excess of $3,000.00, exclusive of interest and costs."

Fourth: The Complaint also alleges (6a) "The rights of which the defendants have deprived the plaintiff include, but are not limited to, his right to work and to earn a livelihood in his chosen occupation; his right to be compensated for work done and services rendered in his occupation and business; his right to litigate with due process of law to obtain protection and enforcement of the said rights; his right to a hearing before the taking of his property, so that he can defend, protect and enforce his rights; his right to an orderly proceeding adapted to the nature of the case and in accordance with law, in which he can protect his rights to his good name, fame and business; his right to an expectancy of continued employment".

Fifth: The entire Complaint (3a-7a) beyond question fully complies with Rule 8(a) of the Federal Rules of Civil Procedure, providing for Notice Pleadings.

Sixth: It is elementary that, as a rule, the plaintiff is entitled to take the defendants' depositions, as noticed.

Seventh: It is likewise elementary that on a Motion to Dismiss, all allegations of the Complaint must be taken as admitted to be true and all inferences there-

from must be construed most favorably towards the plaintiff's case.

Eighth: It necessarily follows for purposes herein that the respondents did deprive your petitioner of his federal constitutional and civil rights, as hereinabove set forth; and it is shown in the Petition authoritatively (8-9) that your petitioner does have those federal constitutional and civil rights as alleged.

Ninth: The failure of the Court of Appeals to accompany its affirmance with a legal Opinion not only is violative of the Canons of Judicial Ethics (Petition, 9) but also sets, or even continues, a dangerous precedent which calls for the exercise of this Honorable Court's powers of supervision.

Tenth: Under the circumstances, the denial of certiorari herein could lead to only one logical conclusion,—that the United States Courts will not protect and enforce the federal constitutional and civil rights as sought by your petitioner, in the face of the authorities cited (Petition, 10) which resolve any doubt about respondents' lack of immunity.

Eleventh: The refusal of the United States Courts, discriminatorily, to protect and enforce such federal constitutional and civil rights not only enters a conflict with the Law of the Land, but also gives credence to the popular misconception that the only federal constitutional and civil rights which are entitled to the protection of and enforcement by the United States Courts are the right to vote and the right to attend an integrated school. In other words the United States Courts will afford such protection and enforcement only for some Negroes in some Southern States. This discriminatory protection and enforcement affords little comfort

and no relief to your petitioner who is a Northern White Protestant.

Twelfth: Your petitioner respectfully advocates the full and complete protection and enforcement, without discrimination, of all federal constitutional and civil rights for all citizens regardless of race, color and creed; for that is the only real, sound basis of freedom in any Republic. The provisions for such equality and freedon are already in our Constitution and Civil Rights Acts. What the citizens, including your petitioner, sorely need are the equal protection and indiscriminate enforcement thereof. Your Honorable Court is able to accomplish this; and it assumed that it is ready and willing to do so. Therefore, it will reverse the judgment sought to be reviewed herein.

Thirteenth: This case is of such public importance as to persuade this Honorable Court to exercise its sound judicial discretion to review on writ of certiorari.

Wherefore, your petitioner prays that this Honorable Court will grant this petition for rehearing.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay; and that it is restricted to the grounds specified in paragraph 2 of Rule 58.

PAUL GINSBURG,
Counsel for Petitioner.